



R.61-72, PROCEDURES FOR CONTESTED CASES

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**Office of General Counsel
S.C. Department of Health
and Environmental Control
2600 Bull Street
Columbia, SC 29201
(803) 898-3350**

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PART I Definitions and Applications.

101. Definitions.

A. Adjudicatory hearing. A trial-type proceeding held before the Board of Health and Environmental Control or its designee as part of administrative review of a staff decision and shall include a contested case as defined in the Administrative Procedures Act.

B. Administrative review. The process by which the Board reviews staff decisions in order to render a final agency decision.

C. Board. The Board of Health and Environmental Control.

D. Day. Calendar day.

E. Department. The Department of Health and Environmental Control, including the staff of the Department.

F. Hearing Officer. A designee of the Board of Health and Environmental Control appointed by the Board, or Commissioner pursuant to authorization by the Board, to conduct an adjudicatory hearing.

G. License. Any Department permit, franchise, certificate, certification, registration, or similar form of permission or authorization required by law.

H. Licensing. The process which results in the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or modification of a license by the Department.

I. Order. A written document, other than a license, which embodies a final staff decision imposing sanctions or requirements. It may be, but need not be, denominated an "Order". It includes, but is not limited to, administrative orders so denominated; a staff decision to deny a license; or any decision from which appeal may be taken pursuant to other applicable law or regulation

J. Party. A person who initiates administrative review by filing a Petition, or is deemed to be a

party by operation of Section 402, or who is admitted to participate in an adjudicatory hearing, with rights to participate by presenting evidence, and calling and cross-examining witnesses. The Department is deemed to be a party.

K. Permit. A license.

L. Person. Any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than the Department.

102. Applicability.

The provisions of this regulation shall apply to all proceedings, except as modified by agreement of all parties or as otherwise provided by law or regulation, in which the right to hearing (a) is provided by the Administrative Procedures Act; (b) is specifically required by other statutes or regulations; or (c) is required by due process under the South Carolina or United States Constitutions. The provisions of this regulation shall not be construed to affect the availability of any other procedure consistent with applicable law.

PART II Commencement.

201. Petition.

A. Any person may request an adjudicatory hearing by filing a Petition for Administrative Review with the Clerk of the Board. Any such Petition must be filed within 15 days, or other period provided by law, following actual or constructive notice of a final staff decision on a licensing matter as defined above, or following receipt of an administrative order.

B. The filing of a Petition within the time established by Section 201(A) or applicable substantive regulation or law is necessary to give the Department jurisdiction to conduct administrative review.

C. Petitions shall be signed by the party or its attorney, and shall contain the following information:

1. Identity of the petitioner and nature of interest in the matter for which review is requested;
2. Caption or other information sufficient to identify the decision or order appealed from;
3. The date of receipt of the decision or order appealed from;
4. Facts, stated with particularity, alleged by the petitioner as grounds entitling it to relief.

5. If review of an order is sought an admission or denial of the specific findings of fact or conclusions of law contained therein. A party shall deny only the whole or part of averments in an order as he in good faith may deny.

6. A summary of any prior proceedings in the case, and the extent of petitioner's participation;

7. The relief requested;

8. Any other information necessary for a clear understanding of the case; and

9. An agreement by the petitioner to be subject to cross-examination and to make any employee or consultant of such petitioner or other person represented by the petitioner available for cross-examination at the expense of the petitioner or such other person upon the request of the Hearing Officer, on his own motion, or on the motion of any party.

202. Answer.

A. The Department may serve an Answer.

B. The Answer shall be served within 30 days of receipt of the petition for review. Intervenor admitted as parties shall serve an Answer as directed by the Hearing Officer; motions for leave to intervene may be accompanied by a proposed Answer. The Answer shall respond to all allegations contained in the pleading or other paper being responded to and shall contain any additional allegations upon which the party relies.

C. Default. A party other than the Department which fails to serve an Answer within 30 days of receipt of a Petition shall be deemed in default. Relief from default may be granted by the Commissioner, or by the Hearing Officer if one has been appointed, upon good cause shown for the delay or failure to answer. The decision to deny relief from default may be reviewed by the Board upon filing a request for Board review within 15 days of receipt of the decision. The Department shall not be deemed to be in default.

203. Amendments and Supplements to Pleadings.

Leave to amend or supplement any pleading will be allowed or denied by the Commissioner or by the Hearing Officer if one has been appointed as a matter of discretion; provided that leave shall be freely given when justice requires it.

204. Dismissal of Petition.

If a Petition is defective on its face, it may be dismissed by the Commissioner of the Department upon written notice and motion at any time before appointment of a Hearing Officer. Grounds for dismissal shall include, but are not limited to: untimeliness; lack of standing; failure to state a claim for which the Department can grant relief; mootness; lack of ripeness; lack of jurisdiction; failure to comply

with Section 201; or such other grounds from which the Commissioner determines that an adjudicatory hearing is not required. Dismissal may be reviewed by the Board upon filing a request for Board review within 15 days of receipt of the order of dismissal. This provision shall not be deemed to prohibit a duly appointed Hearing Officer from dismissing a Petition upon proper motion.

205. Stay of Department Decisions and Orders.

A. General Rule. A petition for review of an order stays the order. A decision for review of an order to revoke or suspend a license stays the revocation or suspension. A petition for review of a decision to renew a license for an ongoing activity stays the renewed license, the previous license remaining in effect pending completion of administrative review. A petition for review of a decision to issue a new license stays all actions for which the license is a prerequisite; Matters not affected by the Petition shall not be stayed by the filing of the petition. Petitions appealing only the amount of fines or penalties shall be deemed not to affect those portions of orders imposing substantive requirements.

B. Emergency Action. The general rule of Section 205(A) shall not operate to stay emergency actions taken by the Department pursuant to applicable statute or regulation.

C. Lifting of Automatic Stay. After commencement of administrative review, any party may move before the Hearing Officer, or before the Commissioner if no Hearing Officer has been appointed, to lift the automatic stay. Any party may make a written application to the Board to review the decision of the Commissioner or the Hearing Officer. Unless otherwise ordered by the Board, such application shall be decided by the Chairman without oral presentation to the Board.

D. Stay upon conclusion of Administrative Review. At the conclusion of administrative review, the decision of the Board shall not be stayed except upon order of the Board or a reviewing court.

PART III Pleadings and other Papers.

301. Filing.

The originals of all Petitions, the record of the adjudicatory hearing and the Hearing Officer's report and recommendations, requests for Board review pursuant to Sections 201, 202(D), 204, 205, or 801, and briefs submitted pursuant to Section 802, shall be filed with the Board. No other documents shall be filed. Filing shall be either by personal delivery or by first-class mail or other parcel delivery service addressed as follows: Clerk of the Board, Department of Health and Environmental Control, 2600 Bull Street, Columbia, SC 29201. Filing is effective upon receipt by the Clerk. Electronic delivery or other facsimile does not constitute filing.

302. Service.

Copies of all papers, including but not limited to Petitions, Answers, replies, motions, orders, notices, briefs, shall be served upon all parties. A copy of any Petition shall be served upon any person whose license is in question. A copy shall also be served on the Hearing Officer if one has been appointed. Service of all papers except a Petition shall be effective upon personal delivery or upon first-

class mailing or consignment to a parcel delivery service, postage paid and addressed to the party's last known address. Service upon a party represented by counsel shall be accomplished by service on the attorney.

303. Proof of Service.

Proof of service shall accompany all papers.

304. Form of Papers.

Papers should be typed, double-spaced, on 8- 1/2 H 11 white paper, with a caption showing the title of the case. Supportive backing is not necessary.

PART IV Parties.

401. Standing.

The provisions of this regulation shall not be construed to enlarge or diminish the rights of persons to initiate administrative review or to be parties to adjudicatory hearings. Standing shall be determined on the basis of applicable statutes, regulations, case law and Board orders.

402. Effect of Third-party Petition upon Status of Applicants for Licenses and License Holders.

The applicant or licensee whose license is the subject of a Petition shall be deemed to be a party upon receipt of a copy of the Petition served in accordance with Section 302.

403. Intervention.

A person desiring to intervene in administrative review shall serve a motion stating the grounds including the nature of his affected interest; the Hearing Officer shall rule on this motion after notice and an opportunity to be heard. A motion for leave to intervene may be served at any time after the commencement of administrative review and before the adjudicatory hearing except that, if a public notice of the adjudicatory hearing has been made, a motion to intervene must be served within 15 days of the public notice. A motion to intervene commenced out of time shall be considered only upon a showing of good cause. Upon granting of the motion for leave to intervene, the intervenor shall be admitted as a party and shall be bound by any previous determinations, agreements and arrangements in such proceedings.

404. Impleader.

A party may request that an additional person subject to the jurisdiction of the Board be made a party to administrative review by serving a motion stating the grounds therefor on all parties and on the person sought to be impleaded.

405. Representation.

Only attorneys admitted to practice in the courts of the State of South Carolina, either permanently or pro hac vice, may represent parties in administrative review. No one shall be permitted to represent a party where such representation would constitute the unauthorized practice of law. A party may represent himself, but a party proceeding without legal representation shall remain fully responsible for compliance with this regulation and the Administrative Procedures Act.

PART V Hearing Officer.

501. Appointment.

A Hearing Officer may be appointed by the Board or by the Commissioner on behalf of the Board at any time upon or after commencement of administrative review. More than one Hearing Officer may be appointed to handle different phases of a particular case. Appointment shall be by order of reference.

502. Duties and Responsibilities.

A Hearing Officer duly appointed shall conduct the adjudicatory hearing and any preliminary proceedings, including but not limited to: conducting prehearing conferences; admitting parties; ruling on motions; issuing subpoenas and protective orders; conducting adjudicatory hearings by controlling the order of presentation and cross-examination; making evidentiary rulings; examining witnesses; submitting a report and recommendations to the Board; and all other matters necessary for the prompt and just review of agency staff actions.

PART VI Preliminary Determinations.

601. Motions.

Motions may be served at any time after commencement of administrative review. If a Hearing Officer has not yet been appointed, one may be appointed to decide any motions.

602. Orders.

The Board, or its Chairman, the Commissioner, or Hearing Officer may issue interlocutory orders as may be necessary to decide motions, protect the parties or public, or establish procedures not otherwise established in this regulation.

603. Prehearing conferences.

The Hearing Officer may upon request of any party or upon his own motion conduct prehearing conferences; such conferences may be held for such purposes as he may direct, including but not limited to: simplifying issues; determining the necessity or desirability of amending the pleadings; obtaining admissions of fact and documents which will avoid unnecessary proof; limiting the number of expert witnesses; limiting the scope and time allowed for discovery; resolving discovery disputes; disposing of pending motions; exchanging witness lists; and such other matters as may aid in the disposition of the

appeal. Conferences may be in person or by telephone conference call when appropriate.

604. Discovery.

A. Notice of discovery as provided by this section shall be served upon all parties and upon the Hearing Officer.

B. Depositions may be taken in administrative hearings as provided in the Administrative Procedures Act.

C. Interrogatories shall be responded to within thirty days after service thereof. Whenever a response to interrogatories is discovered to be or becomes incomplete, incorrect or inaccurate, a party has a duty seasonably to supplement or amend such response. Interrogatories shall be limited to the following standard interrogatories, unless otherwise allowed by the Hearing Officer:

1. The names and addresses of individuals known to the parties or counsel to be witnesses concerning the facts of the case, and indicate whether or not statements have been taken from the witnesses and indicate who has possession of such statements;

2. Set forth a list or produce copies of photographs, plats, sketches, or other prepared documents in possession or at the disposal of the party that relate to the Petition or defense thereof;

3. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the adjudicatory hearing;

4. For each individual known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

605. Original Decision by the Board.

The Board reserves the authority to decide a matter in administrative review without referral to a Hearing Officer.

606. Emergency orders.

Upon issuance of an emergency order without prior hearing as authorized by law, the respondent shall be allowed an expedited hearing in accordance with the applicable statute or regulation, to determine whether the emergency order should remain in effect. In the absence of any prescribed time frame for holding an expedited hearing, such hearing shall be convened as expeditiously as possible. A request for expedited hearing shall not stay the emergency order. An emergency order does not of itself commence administrative review.

PART VII Adjudicatory Hearing.

701. Notice.

A. Notice. Except for expedited hearings set pursuant to Section 606 all parties shall receive a minimum of thirty days notice of the adjudicatory hearing, except an intervenor who has been admitted after scheduling of the hearing. With consent of all parties, the notice period may be shortened. The notice shall include a statement of the time, place, and nature of the hearing. Unless set forth in the pleadings, the notice shall also include a statement of the legal authority and jurisdiction under which the hearing will be held; a reference to the particular sections of the statute and rules involved; and a short and plain statement of the matters asserted.

B. Notice of NPDES Permit Hearings. The Department shall issue public notice of adjudicatory hearings on proposed National Pollution Discharge Elimination System permits which shall include:

1. date of the notice of hearing;
2. the name, address, and phone number of the office within the Department holding the hearing;
3. the name and address of the person or persons whose proposed permit will be considered;
4. a concise description of the applicant's activities and operations which result in the discharge identified in the permit application;
5. the name and stream classification of the waterway to which the discharge is proposed to be made, including the location of the proposed or existing discharge identified in the application;
6. the name and address of the person or persons requesting the hearing and the name and address of each known party to the hearing;
7. a statement of issues raised by the original requestor;
8. a brief description of the nature of the hearing, including applicable rules and procedures;
9. the address and phone number of the premises at which an interested party may obtain further information, request a copy of the proposed permit, request a copy of the fact sheet if appropriate, inspect and copy documents comprising the record, submit a request to be admitted as a party and request any additional issues to be considered at the adjudicatory hearing; and
10. where applicable, a statement that confidential information has been received that may be used to determine some of the conditions of the permit.

702. Evidence and Burden of Proof.

A. The Hearing Officer shall observe the rules of evidence as applied in civil cases in the court of common pleas, subject to the provisions of the South Carolina Administrative Procedures Act and this regulation. Official notice may be taken of: (1) Administrative Orders and orders of the Board; (2) the records of previous administrative hearings; (3) official Department publications and reports; (4) official publications and reports of state and federal agencies relied upon by the Department; and (5) matters otherwise subject to official or judicial notice.

B. The moving party shall bear the burden of proof to establish the matters propounded by a preponderance of the evidence; provided, however, that in appeals of orders assessing civil penalties or imposing sanctions, the Department shall have the burden of proof as to the allegations contained therein.

703. Subpoenas.

The Hearing Officer, on his own motion or the motion of a party, shall have the right to issue subpoenas requiring the attendance and testimony of witnesses and the production of documents in question in the proceeding. Upon motion and opportunity to be heard, the Hearing Officer shall rule on requests to quash or otherwise limit subpoenas. The proponent of a subpoena shall cause the subpoena to be served on the witness personally, together with a tender of the witness fees and mileage as provided by law. The proponent of a witness shall pay the witness fees and mileage.

704. Record of prior public hearings.

A. Informal record. If a record has been compiled in informal proceedings in the case, such as the record of a public hearing on a permit application, the informal record may be made a part of the adjudicatory hearing record. Upon motion and opportunity to be heard, the Hearing Officer may limit the purposes for which the informal record is admitted.

B. Obligation to raise issues and provide information during public comment periods. Where a public comment period on a proposed license decision is provided pursuant to statute or regulation, all persons, including applicants, who propose a particular decision, must notify the Department. Such notification should contain all reasonably ascertainable issues, available arguments, and factual grounds supporting their position, including any supporting material which is not already part of the administrative record for the license. The notification must be provided to the Department by the close of the public comment period. Issues or evidence which are not presented to the Department during informal proceedings may be excluded during the adjudicatory hearing, unless good cause is shown for the failure to present them earlier.

705. Order of presentation.

The party having the burden of proof on an issue shall present its case first. Unless the Department has the burden on an issue, it shall present its case last.

706. Oral argument and briefs.

A party shall be allowed to make opening and closing statements, subject to reasonable limitations as determined by the Hearing Officer. Briefs and proposed orders may be allowed or required at the discretion of the Hearing Officer.

707. Transcripts.

The adjudicatory hearing shall be recorded by a certified court reporter, and may be transcribed at the request of any party, at the expense of the requesting party.

708. Reopening hearings.

A party may, before the rendering of the Hearing Officer's determination, move to supplement the record or reopen the hearing to introduce additional evidence, which motion shall be granted only upon a showing of good cause. The Hearing Officer may also reopen the hearing on his own motion before issuance of the report and recommendations. Any subsequent hearing shall be convened on no less than 10 days notice to all parties.

709. Report.

The Hearing Officer's report shall consist of a written report to the Board to include findings of fact, conclusions of law, discussion if appropriate, and a recommendation for decision. It shall be submitted within the time required by the order of reference, except for good cause shown. Copies shall be served on all parties. If ordered by the Board or Commissioner, the Hearing Officer may refer the record to the Board without a report.

710. Motion for reconsideration of Hearing Officer's report.

A party may file a motion for reconsideration of the Hearing Officer's report, identifying the points the Hearing Officer is supposed to have overlooked or misapprehended. The motion must be served within 15 days of receipt of the report. The time for service of a request for review under Section 801 shall not commence until the Hearing Officer has disposed of the motion. A motion for reconsideration is not a prerequisite to Board review or subsequent judicial review of issues raised and ruled upon. The Hearing Officer may deny a motion for reconsideration without an additional hearing.

PART VIII Board Review.

801. Board review of Hearing Officer's report.

The Board shall review any Hearing Officer's report upon request by any party. The request for review must be filed within 15 days of receipt of the Hearing Officer's report and must include specific exceptions to the report. Each exception must be concise and concern one finding of fact, conclusion of law, or other proposition believed to be error. If no request for review is filed within fifteen (15) days, the Hearing Officer's findings and recommendations shall be adopted as the final decision in the case.

and an appropriate order shall be prepared if necessary, unless the Board on its own motion and upon notice to all parties reviews the determination of the Hearing Officer.

802. Briefs.

Unless ordered by the Board, briefs are not required, but may be filed by any party within 30 days after filing the application for review. Responsive briefs are not required, but must be filed within 15 days of receipt of the brief responded to. The time for filing briefs may be shortened by agreement of the parties.

803. Notice and hearing.

Notice that the Board will review the hearing officer's report shall be given to all parties by the Department after expiration of the time to file briefs and at least ten days in advance of the Board meeting at which the matter will be heard. All parties shall have an opportunity to argue orally before the Board subject to reasonable time limits. Proceedings shall be recorded by a certified court reporter and may be transcribed at the request of any party, at the expense of the requesting party.

804. Evidence.

The Board shall not consider new or additional evidence during its review except upon good cause shown and provided that there is an opportunity for cross-examination and rebuttal by all parties. The Board may remand the case to the Hearing Officer for the taking of additional evidence if necessary for a fair and complete resolution of the issues.

805. Decision.

The Board's decision shall be the final agency decision in the case unless (a) the case is remanded to the Hearing Officer or staff for further proceedings; (b) a request for reconsideration is granted; or (c) the decision otherwise provides. The decision, if final, shall be reduced to a written order with findings of fact and conclusions of law. The Board may make its own findings of fact and conclusions of law upon review of the record and the Hearing Officer's report. The Board may adopt, reject, or modify the Hearing Officer's recommendation, and may grant any relief warranted, including the assessment of civil penalties. The Board is not limited in its decision to conditions or penalties assessed by the Department. In review of a case brought before the Board without referral to a Hearing Officer, the Board may make a final decision or may refer the case to the Hearing Officer if necessary for the taking of evidence.

806. Reopening the hearing and reconsideration.

The Board may rehear and reconsider a case after its decision, upon good cause shown on motion of any party filed within 15 days of receipt of the decision. Grounds for reconsideration shall be stated in the motion, and notice of a rehearing shall be given at least ten days in advance of the Board meeting. Filing the motion shall toll the time for appeal to the Circuit Court. A motion for reconsideration is not a prerequisite for judicial review of issues raised and ruled upon.

PART IX Time Requirements.

901. Time ending on weekend or holiday.

When the time prescribed in this regulation for doing any act expires on a weekend or legal holiday, the time shall extend to the next day that is not a weekend or South Carolina legal holiday.

902. Extensions.

Time requirements, except for the filing of the initial Petition, may be extended by consent of the parties or by the Hearing Officer, Commissioner, or the Board Chairman upon request and good cause shown.

903. Additional time after service by mail.

Whenever a party has the right or obligation to do some act within a prescribed period of time after service of documents upon the party, and service has been effected by mail, five days shall be added to the time in which response is required. This section shall not apply to the time in which petitions for administrative review must be filed nor to notice of hearing under Section 701.